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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956.

No. ~~1092~~ 194

FLORENCE KOSTNER,

*Petitioner,*

*vs.*

CHICAGO LAND CLEARANCE COMMISSION,
A MUNICIPAL CORPORATION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS.

## BRIEF FOR THE CHICAGO LAND CLEARANCE COMMISSION IN OPPOSITION.

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### STATEMENT OF THE CASE.

This was a proceeding to acquire 236 parcels of real estate totalling 26 acres (Addl. Rec. 6) situated in a slum and blighted area for resale and redevelopment pursuant to the Blighted Areas Redevelopment Act of 1947, as amended (Ill. Rev. Stat. 1953, Ch. 67½, Secs. 63 to 91), including three parcels of vacant property owned by Florence Kostner, Petitioner herein (R. 67), and known as Parcels Nos. 1-9, 4-56 and 1-13 (R. 40, 41). The constitutionality

of the Act was upheld in *Chicago Land Clearance Commission* v. *White*, 411 Ill. 310 (cert. den. 344 U. S. 824).

The Chicago Land Clearance Commission (hereinafter referred to as "Commission") on March 28, 1951, made its determination that the area in question was a slum and blighted area (R. 3). That determination was approved by the City Council of the City of Chicago on October 11, 1951 (R. 3, 4) and by the State Housing Board on November 7, 1951 (R. 4). The area is shown on page 7 of the Additional Record filed herewith. All of the parcels of property have been acquired (Addl. Rec. 6) and certain portions of the area have been sold (Addl. Rec. 6, 8) to be redeveloped in accordance with the approved plan of redevelopment (Addl. Rec. 6 and 7). A sale of a segment of the area in which one of Mrs. Kostner's parcels is situated has been approved by the Commission, the City Council of the City of Chicago and the State Housing Board (Addl. Rec. 4, 8) and is being delayed pending the outcome of this proceeding (Addl. Rec. 4).

The petition to condemn, including the three parcels owned by Petitioner herein, was filed on April 2, 1953 (R. 55). The appearance of the Petitioner, Florence Kostner, was filed by her attorneys, Arvey, Hodes & Mantynband, and James A. Harrington, on May 14, 1953 (R. 10). The Supreme Court of Illinois in its opinion (Appendix A, p. 1a) referred to these attorneys as "a competent firm of lawyers".

In September 1953 the trial court fixed October 1, 1953 as a date for a pretrial conference for the purposes of ascertaining just compensation and hearing was ordered on traverses then on file as to certain parcels to be set for October 6, 1953 (R. 15). During the period between October 1, 1953 and January 26, 1954, the case, including Mrs. Kostner's parcels, was on the trial call on repeated dates

for the purpose of a hearing on the issue of just compensation and was continued from time to time (R. 15 to 19).

On January 26, 1954, an order was entered by Judge Denis J. Normoyle requiring all defendants desiring to contest the right of the Commission to maintain the condemnation suit and who had not theretofore done so, to file a traverse or other pleading contesting the Commission's right to condemn within seven days from the date of the order or be deemed to have waived the right to file such pleading (R. 19, 20). Immediately thereafter James A. Harrington, one of Mrs. Kostner's attorneys, stated to the court that he did not intend to file a traverse on behalf of the properties owned by Mrs. Kostner but would abide the court's decision on traverses then pending as to other parcels in the proceeding. At page 10 of her petition herein Mrs. Kostner states that "this statement is not borne out by the record". Mrs. Kostner's statement is incorrect as shown by the report of proceedings had before Judge Normoyle on February 14, 1955, certified by him to be correct (R. 71) wherein he states that such an agreement was made (R. 72).

After January 26, 1954 the case, including the parcels owned by Mrs. Kostner, again appeared on the trial call on repeated occasions for the sole purpose of hearing the issue of just compensation and was continued from time to time to February 14, 1955 (R. 20 to 32). It will thus appear that over one year elapsed after the order of January 26, 1955, and one year and eight months after the date (May 14, 1953) that Mrs. Kostner entered her appearance in the proceeding, and at no time was a request made by Mrs. Kostner to file a traverse.

On February 14, 1955, a motion was presented for leave to substitute Joseph O. Kostner (Mrs. Kostner's son) (R. 72) and Boyle & Friedman as attorneys for Mrs. Kos-

tner, and also for leave to file a traverse (R. 71 to 76). The motion for leave to file a traverse was denied. The formal order was entered on April 22, 1955 (R. 34) *nunc pro tunc* as of February 14, 1955 (R. 35). No showing by affidavit or otherwise was made to excuse Mrs. Kostner's long delay.

The report of the proceedings (R. 71 to 76) had and taken on February 11, 1955, on the hearing on the foregoing motion before Hon. Denis J. Normoyle, trial judge, and certified by him to be correct (R. 71) shows that the trial judge in denying the motion for leave to file a traverse referred to the order of January 26, 1954; to the agreement made on or about January 26, 1954, by Mrs. Kostner's attorney that he did not intend to file a traverse but would abide the result of other traverses; that the other traverses referred to by Mrs. Kostner's attorney had been disposed of after an extended trial and had been overruled prior to February 11, 1955 (R. 72, 75) and that Mrs. Kostner had been in to see him (Judge Normoyle) on several occasions (R. 74).

Thereafter Boyle & Friedman withdrew from the case (R. 58, 59). On April 22, 1955 Judge Normoyle entered an order reciting that Mrs. Kostner's parcels had been on the trial call each court day from April 11, 1955 and that Joseph O. Kostner, Mrs. Kostner's attorney, had not appeared in court on any of these days, and the matter was continued to April 25, 1955 (R. 36, 37). Mr. Kostner was notified of this order and on April 28, 1955 filed a petition for change of venue (R. 38). The change of venue was granted and the cause was transferred to Judge Lee W. Carrier, and it was set for trial on May 23, 1955 (R. 40). On that date Mr. Joseph O. Kostner withdrew as attorney and Wisch & Crane entered their appearance as her attorneys (R. 40). Thereafter the case was set for trial on the issue of just compensation for June 13, 1955, at the

head of the trial call (R. 42), and on that date an order was entered that the substitution of attorneys filed on May 23, 1955, by Wisch & Crane be withdrawn and that the appearance of Joseph O. Kostner stand as the appearance for Mrs. Kostner (R. 42).

After the change of venue was granted on April 28, 1955, Judge Carrier entered three orders, the first on May 4, 1955, setting the trial "on the issue of just compensation" on May 23, 1955 (R. 40); the second, on stipulation of Mrs. Kostner's attorney, consolidating the parcels owned by her for the purpose of trial "on the issue of just compensation" (R. 41), and the third, on May 31, 1955, setting the trial "on the issue of just compensation" for June 13, 1955 (R. 42). At no time throughout this period was there any intimation of a desire to file a traverse.

On June 13, 1955, when the case was called for trial on the issue of just compensation, Mrs. Kostner presented her verified petition for leave to file a traverse (R. 43) and at that time a new law firm, namely, Mortimer, Nolan, O'Malley & Dunne, entered their appearance as associate counsel for Mrs. Kostner (R. 48). The petition for leave to file a traverse was denied and on June 13, 1955, there was a jury trial on the issue of just compensation. The jury verdict was set aside on the court's own motion for reasons not here pertinent (R. 48).

On October 24, 1955, a second trial was commenced on the issue of just compensation and Judge Carrier's illness necessitated a mistrial order (R. 48, 49). The cause was again set for trial on February 6, 1956 before Judge Erza Clark. Three days prior thereto Mrs. Kostner's attorneys filed a motion, together with an affidavit, requesting that the order entered on June 13, 1955 denying leave to file a traverse be reconsidered (R. 49). This motion was denied.

A jury trial was then had on the question of just compensation resulting in a judgment ascertaining just compensation for Mrs. Kostner's parcels of land, and the appeal to the Illinois Supreme Court followed.

We quote from the opinion of the Illinois Supreme Court: "It hardly seems necessary, in view of the foregoing history of this proceeding, to discuss reasons or precedents in support of our conclusion that this judgment should be affirmed" (Page 5a of the petition of Florence Kostner herein).

## ARGUMENT.

There is no denial of due process in this case and no Federal question is involved. The Petitioner herein filed her appearance in the lower court on May 14, 1953. On January 26, 1954 the court entered its order requiring all defendants desiring to file a traverse or other motion contesting the right of the Commission to condemn to do so within seven days from the date of the order. At no time during this period of eight months did Petitioner herein file or ask leave to file a traverse or other pleading. Due process of law is satisfied if a party has had a reasonable opportunity to have a hearing (*Simon* v. *Craft*, 182 U. S. 427, 437; *Iowa Central R. Co.* v. *State of Iowa*, 160 U. S. 389, 393-394; *Dohany* v. *Rogers*, 281 U. S. 362, 369).

Furthermore, at the time of the entry of the order of January 26, 1954, the attorney then representing the Petitioner herein, stated to the court that he did not intend to file a traverse or other pleading but would abide the result on other traverses then on file. This appears in the record of this proceeding (see foregoing Statement of Case and R. 72), despite Petitioner's statement to the contrary.

The propriety of the order of January 26, 1954 is a matter of state court procedure and was approved by the Supreme Court of Illinois in its opinion in the instant case (see Appendix A to the Petition herein). No Federal or constitutional question is involved in a matter of state court practice (*Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 1, 9; *Iowa Central R. Co.* v. *State of Iowa*, 160 U. S. 389, 393-394; *Simon* v. *Craft*, 182 U. S. 427, 437; *Jordan* v. *Massachusetts*, 225 U. S. 167, 174).

No request was made by the Petitioner herein for leave to file a traverse until February 11, 1955, more than one

year after the entry of the order of January 26, 1954. Action upon such request rested wholly in the discretion of the Court. The facts in this case clearly demonstrate that the trial court did not abuse its discretion in refusing leave to file a traverse at that late date. The Supreme Court of Illinois sustained the action of the trial court. The exercise of discretion by a state court does not raise a Federal or constitutional question (*Yazoo & M. V. R. Co.* v. *Adams*, 180 U. S. 1, 9; *Gormley* v. *Bunyan*, 138 U. S. 623, 629; *Carr* v. *Nichols*, 157 U. S. 370, 371).

## CONCLUSION.

The decision of the Supreme Court of Illinois is correct. Upon the record herein, and for the reasons stated, it is respectfully submitted that no Federal or constitutional question is here involved.

Wherefore, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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